Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate of
Rebecca Anne Tebbetts,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of New Hampshire correctly held, in direct conflict with decisions of four United States Courts of Appeals, that the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 do not preempt state tort law claims alleging that an automobile was defectively designed because it was not equipped with airbags.

RULE 29.1 LISTING

Petitioner Ford Motor Company has no parent company. The entities listed below are those in which Ford Motor Company owns an equity interest of at least ten per cent, but that are not wholly owned by Ford Motor Company:

Autolatina America, Inc.
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Apolo—Administradora de Bens S/C Ltda.
- Autolatina S.A.

Canada
- TCG, International

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland
- Ford Nederland B.V.

Netherlands
- Ford Credit B.V.

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

South Africa
South African Motor Corporation, Ltd. (SAMCOR)

Sweden
Ford Motor Company Aktiebolag

Switzerland
Ford Motor Company (Switzerland) S.A.

Petitioner Robert H. Irwin Motors, Inc. has no parent or subsidiary company.

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PETITION FOR WRIT OF CERTIORARI

Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively, "Ford"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is not yet reported and is included in the Appendix at pp. 1a-7a. The order of the superior court granting Ford's motion for summary judgment is not reported and is included in the Appendix at pp. 8a-12a.

JURISDICTION

The final judgment of the Supreme Court of New Hampshire on the federal constitutional question presented by this petition was entered on September 19, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

15 U.S.C. § 1392(d)[1] provides:

> (d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

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[1] The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, along with other statutes governing transportation, recently was recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1392(d) is now 49 U.S.C. § 30103(b). All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this petition uses the citations employed in those decisions. The recodified cited provisions are set forth in the Appendix at pp. 13a-14a.

> effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k)[2] provides:

> (k) Continuation of common law liability
>
> Compliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law.

49 C.F.R. § 571.208 is a lengthy regulation, the pertinent text of which is set forth in the Appendix at pp. 15a-36a.[3]

STATEMENT OF THE CASE

1. On May 15, 1991, at approximately 2:15 a.m., Rebecca Anne Tebbetts was killed when the 1988 Ford Escort she was driving hit a rock on the shoulder of the road, richocheted across two lanes of traffic, slid down an embankment, smashed into a tree, and rolled over. On January 29, 1993, Respondent, the administratrix of the decedent's estate, filed this lawsuit, alleging that the 1988 Escort was defectively designed because it provided pro-

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[2] Now 49 U.S.C. § 30103(e).

[3] The pertinent regulatory text as it existed in 1988 is set forth at pp. 27a-36a. The pertinent regulatory text as it exists today is set forth at pp. 15a-26a. The differences are not material to the question presented here.

tection to its driver with a safety-belt system consisting of a motorized, automatic shoulder belt and a manual lap belt, rather than with an airbag.

2. When Ford designed and manufactured the 1988 Escort, there was in effect, and there still is in effect, a Federal Motor Vehicle Safety Standard, No. 208, that required manufacturers to phase in passive restraints—that is, restraint systems, such as automatic safety belts or airbags, requiring no action by the occupant to make the system operational after the ignition has been turned on—by installing some form of passive restraints into the front outboard seating positions of 10 percent of 1987 model-year cars, 25 percent of 1988 model-year cars, 40 percent of 1989 model-year cars, and all 1990 model-year cars. 49 C.F.R. § 571.208. The Safety Standard explicitly authorized and encouraged manufacturers to provide a variety of passive restraints, including automatic safety belts. *Id. See* 49 Fed. Reg. 28962 *et seq.* (July 17, 1984).

In explaining why federal safety policies required a Safety Standard that would encourage automobile manufacturers to provide the public with a variety of passive restraint systems, the Secretary of Transportation emphasized why one specific such restraint, the airbag, should not be required instead of, or in addition to, automatic safety belts. First, the real-world data with respect to the effectiveness of airbags relative to the effectiveness of safety belts were still too sparse to be statistically reliable; and what data there were showed that airbags previously available had provided *no* increased safety over safety belts *as used,* even though the usage rate for manual belt systems was less than 20 percent:

> Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

49 Fed. Reg. 28962, 28985 (July 17, 1984). The phase-in schedule selected by the Secretary was necessary to achieve federal safety goals because "[w]idespread use of both [airbag systems and safety belt] systems is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001.

Second, airbags continued to present unique safety dangers, including the danger from propellants used to inflate airbags and the danger of disposal of cars with "live" airbag propellants still in them. The Secretary cautioned, for example, that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992.

Third, the Secretary was concerned that an airbag requirement might indirectly cause even more injuries and deaths because

> the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile.

Id. at 29001.

Fourth, after observing that public acceptance of safety devices likely to be installed in compliance with Federal Motor Vehicle Safety Standards was one of the factors the Department of Transportation was required by law to consider, *id.* at 28987, the Secretary expressed a concern that requiring airbags in all cars would provoke a consumer "backlash" that would defeat the Department's safety goals. *Id.* at 29001.

Fifth, the Secretary concluded that requiring the installation of airbags in all cars would "stifle innovation in occupant-protection systems" and thereby create "the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." *Id.*

Thus, the choice of restraint-system options provided in Safety Standard 208 was promulgated because the Federal Government had determined that federal safety policies would be severely impaired if the manufacturers did not provide a variety of restraint systems, specifically including automatic safety belts. As the Third Circuit later found, "That such flexibility and choice is an essential element of the regulatory framework established in Standard 208 has repeatedly been made clear in the regulatory history of this particular safety standard." *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1124 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990).

3. In the several years following the promulgation of the 1984 amendments to Safety Standard 208, the National Highway Traffic Safety Administration and the Department of Transportation three times explicitly stated that the Safety Standard was intended to achieve implied preemption of state common law claims alleging that cars without airbags are for that reason defective. Brief of the United States as *Amicus Curiae*, filed in *Wood v. General Motors Corp.*, 494 U.S. 1065 (1990) (No. 89-46) (hereinafter "United States Amicus Brief in *Wood*"); Brief of the United States as *Amicus Curiae*, filed in *Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995) (No. 94-286) (hereinafter "United States Amicus Brief in *Myrick*"); Brief of the United States as *Amicus Curiae* filed in *Ritt v. General Motors Corp.*, No. 88-1822 (7th Cir. 1989) (hereinafter "United States Amicus Brief in *Ritt*").

4. Against that background, on August 11, 1993, Ford moved for summary judgment in this action on the ground that, under the Supremacy Clause of the United States Constitution, the "no-airbag" claim asserted by Respondent under New Hampshire state law was preempted by the National Traffic and Motor Vehicle Safety

Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("the Safety Act"), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208. On October 14, 1993, the superior court granted Ford's motion.

Respondent appealed to the Supreme Court of New Hampshire. On September 19, 1995, that court announced its decision holding that "no-airbag" claims are not preempted by federal law and reversing the judgment of the superior court.

Although recognizing that the Safety Act contained an express preemption provision, 15 U.S.C. § 1392(d), that "alone might suggest that common law actions are preempted," App. at 4a, the Supreme Court of New Hampshire held that the existence of another provision later in the Act, 15 U.S.C. § 1397(k), precluded any express preemption. Without parsing the language of section 1397(k), comparing it to the two explicit saving clauses in the preemption provision itself, or discussing any of this Court's many decisions establishing the meaning and effect of saving clauses, the court characterized that section as a saving clause and concluded without more: " 'It is difficult to imagine broader language.' We therefore conclude that state common law is not explicitly preempted." App. at 5a (citation omitted).

Turning next to implied preemption, the New Hampshire court held that the presumption against express preemption of state police-power regulations applies to all forms of implied preemption as well, App. at 5a, and that section 1397(k) and its legislative history provided "a reliable indicium of congressional intent" to disallow all forms of implied preemption. App. at 6a. The court did not inquire at all as to whether the plaintiff's "no-airbag" claim under state common law standards would conflict with the federal purposes and policies underlying Safety Standard 208. In fact, the court did not even acknowledge that the Federal Government had

three times explicitly declared that "no airbag" claims would create such a conflict and should be preempted.

The New Hampshire court recognized that "the majority of courts faced with a similar preemption inquiry have held common law actions preempted," App. at 6a, and the court specifically cited the First Circuit's decision so holding in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). The only explanation offered by the court for placing itself into direct conflict with the First Circuit was this: "Had the United States Supreme Court not clarified preemption analysis in *Cipollone* [*v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992)] subsequent to *Wood*, Ford's argument would be more persuasive." App. at 6a. The court did not explain how it thought *Cipollone* had undermined *Wood*, other than to cite a law review article in which the author argued that in *Cipollone*,

> [c]ontrary to any prior precedent, seven justices apparently ruled that all doctrines of implied preemption, both "conflict" and "occupation-of-the-field" varieties, are eliminated once Congress enacts a provision that, to some degree, expressly preempts state law.

Kurt B. Chadwell, *Automotive Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 142 (1994) (hereinafter "Chadwell") (cited in App. at 6a). The New Hampshire court did not acknowledge that the article had been written before this Court's recent decision rejecting that interpretation of *Cipollone* as "without merit." *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 (1995).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A DIRECT CONFLICT, ON IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND FEDERAL STATUTORY INTERPRETATION, BETWEEN A STATE COURT OF LAST RESORT AND FOUR FEDERAL COURTS OF APPEALS, INCLUDING THE COURT OF APPEALS FOR THE CIRCUIT IN WHICH THAT STATE IS LOCATED

A. The Decision Below Conflicts With Decisions of Four Federal Courts of Appeals and Many Other Courts

In this case the Supreme Court of New Hampshire ruled that "no-airbag" claims brought under a state's tort law are neither expressly nor impliedly preempted by federal law. In *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), however, the First Circuit had already held that "no-airbag" claims *are* impliedly preempted by the Safety Act and Safety Standard 208. Thus, the New Hampshire court created a direct conflict between itself and the United States Court of Appeals for the circuit in which New Hampshire is located.

The decision below also directly conflicts with decisions by all of the other three United States Courts of Appeals that have addressed this issue. Those three courts, like the First Circuit Court of Appeals, have held "no-airbag" claims preempted by the Safety Act and Safety Standard 208. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990);[4] *Kitts*

[4] In *Myrick v. Freuhauf Corp.*, 18 F.3d 1516 (11th Cir. 1994), in the context of determining whether common law tort claims were preempted by Safety Standard 121, governing air brakes in trucks, the Eleventh Circuit opined that this Court's decision in

v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

Still further, the New Hampshire court's decision directly conflicts with decisions by at least 83 other state appellate and trial courts and by at least 51 United States District Courts throughout the nation. *E.g.*, *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Nissan Motor Corp. v. Superior Court*, 261 Cal. Rptr. 80 (Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (1988).[5] Indeed, although the New Hampshire court attempted to justify its disagreement with all of those courts by indicating that it might have reached a different result "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*," App. at 6a, the court simply ignored the fact that, *after Cipollone*, at least eleven United States District Courts and six states' appellate courts had given preemptive effect to the Safety Act and Safety Standard 208, thus disagreeing with the New Hampshire court's suggestion that in *Cipollone* this Court had significantly restricted the scope of the Supremacy Clause. *E.g.*, *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995); *Tammen v. General*

Cipollone v. Liggett Group, Inc., —— U.S. ——, 112 S. Ct. 2608 (1992), had overruled the reasoning that the Eleventh Circuit had relied on in holding "no-airbag" claims preempted in *Taylor*. On review, however, this Court flatly rejected as "without merit" the Eleventh Circuit's reading of *Cippollone*. *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 (1995). Accordingly, *Taylor's* holding that "no-airbag" claims are impliedly preempted is still the law of the Eleventh Circuit.

[5] The 134 decisions finding preemption are listed in the Appendix at pp. 37a-46a.

Motors Corp., 857 F. Supp. 788 (D. Kan. 1994); *Montag v. Honda Motor Co.*, 856 F. Supp. 574 (D. Colo. 1994), *appeal filed; Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *O'Bryan v. Volkswagen of Am., Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992); *Panarites v. Williams*, 629 N.Y.S.2d 359 (App. Div. 1995); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994), *cert. denied*, No. 94-1910, 1995 WL 334794 (Oct. 2, 1995); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. denied*, 649 A.2d 1291 (N.J. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App.—Dallas 1993, no writ); *Wilson v. Pleasant*, 645 N.E.2d 638 (Ind. Ct. App. 1994), *cert. granted and decision vacated while case is pending before Ind. Supreme Ct.*

B. The Same Conflict Is Developing Among Other Lower Courts

Although the Supreme Court of New Hampshire is the first state court of last resort to have put itself into direct conflict with the federal courts of appeals by holding "no-airbag" claims not preempted, judicial conflicts on this important question of preemption law are developing especially between state courts and federal courts. Thus, for example, a direct conflict exists in Pennsylvania, where the Third Circuit has held "no-airbag" claims preempted and the Pennsylvania Superior Court, Appellate Division, has held such claims not preempted. *Compare Pokorny*, 902 F.2d 1116, *with Heiple v. General Motors Corp.*, No. 808, 1995 WL 602836, —— A.2d —— (Pa. Super. Ct. Oct. 13, 1995), *and Gingold v. Audi-NSU-Auto Union A.G.*, 567 A.2d 312 (Pa. Super. Ct. 1989). The 42 court decisions finding no preemption under Safety Standard 208 are listed in the Appendix at pp. 47a-49a.

The adverse consequences of this developing nationwide judicial disarray are considerable, for the public, the

courts, and the automobile industry. The Supremacy Clause, the federal Safety Act, and federal Safety Standard 208, rather than being applied to like claims in a like manner, are being applied in patchwork fashion. Whether manufacturers must bear the burden of defending "no-airbag" claims depends on the state in which the claim is brought and, as to some states, whether the claim is brought in a state court or in a federal court in the same locale.

The conflict not only spawns inconsistent application of the Supremacy Clause, but erodes the very core of federal safety policies underlying Safety Standard 208. As the National Highway Traffic Safety Administration and the Department of Transportation have explained, "[Safety Standard] 208 establishes . . . an express federal safety policy of encouraging diversity in passive protection systems. Holding a motor vehicle manufacturer liable for failing to install one specific system—an airbag protection system—would conflict with that fundamental objective . . . ." United States Amicus Brief in *Wood*, at 8.

Also, the volume of cases in which the conflict is likely to continue to manifest itself, if left unresolved by this Court, is now sure to increase. Since July 1984, when the Safety Administration promulgated the version of Safety Standard 208 here in issue, more than 100 million automobiles have been manufactured and sold with the wide variety of passive restraints—the motorized shoulder belt involved in this case, the two-point belt system first developed by Volkswagen, the three-point, door-mounted belt system developed by General Motors, airbags, and others—that the Safety Administration sought to elicit by promulgating those amendments. Approximately 93 million of those automobiles were equipped with restraint systems other than airbags in one or more of the front outboard seating positions. *See generally* Automotive News Market Data Books (1985-1995). Moreover, although modern restraint systems and other factors have dramatically reduced the annual number and

frequency of reported injury-producing accidents since 1984, there still are approximately two million such accidents each year. *See* National Highway Traffic Safety Administration, Traffic Safety Facts 1993, at 14 (1994). In jurisdictions that hold "no-airbag" claims not preempted, almost any of those accidents can spawn a claim that an airbag would have prevented or reduced some injury. Unless this Court resolves the conflict and confirms that the federal courts of appeals are correct and the Supreme Court of New Hampshire incorrect, more and more plaintiffs are likely to bring "no-airbag" claims, trying to persuade still more courts to align themselves with the minority, errant no-preemption view.

C. The Judicial Conflict Arises Out of Two Important Questions of Federal Statutory Interpretation Explicitly Reserved by This Court Last Term

The conflict created by the decision below is further important because it directly implicates the two questions of federal statutory interpretation explicitly reserved by this Court last term in *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 n.3 (1995): (1) Whether the term "standard" in the Safety Act's express preemption provision, 15 U.S.C. § 1392(d), preempts only state statutes and regulations, and not common law; and (2) whether 15 U.S.C. § 1397(k) is a saving clause that precludes any preemption of common-law tort claims. Unless this Court addresses those issues now, the existing uncertainty is sure to spawn further judicial conflict. Accordingly, this case should be used to resolve the growing conflict and to restore uniform application of the Supremacy Clause, the Safety Act, and Safety Standard 208.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS THAT ESTABLISH THE MANNER IN WHICH PREEMPTION ANALYSIS IS REQUIRED TO BE CONDUCTED

Because of its misunderstanding of basic preemption principles—especially the difference between the constitutional doctrine of preemption and the nonconstitutional affirmative defense of compliance with statutes or regulations—the Supreme Court of New Hampshire also misconstrued and misapplied this Court's decisions that establish the manner in which preemption analysis is required to be conducted. Other courts in the minority group that have held "no-airbag" claims not preempted have similarly misconstrued this Court's preemption decisions. Accordingly, review in this case is necessary to make even clearer the requirements that the Supremacy Clause imposes whenever preemption is asserted, whether with respect to the Safety Act and Safety Standard 208 or with respect to other federal statutes and regulations.

A. The Supreme Court of New Hampshire Misconstrued and Misapplied the Express Preemption Principles Established by This Court

The Supreme Court of New Hampshire correctly acknowledged that the Safety Act has a provision, 15 U.S.C. § 1392(d), that explicitly addresses the issue of preemption and that "alone might suggest that common law actions are preempted . . . ." App. at 4a. As codified until last year, and throughout the legislative proceedings that led to its enactment, the language of section 1392(d) appeared under one of two titles: "Supremacy of federal standards" or "Preemption." *See* 15 U.S.C. § 1392(d) (entitled "Supremacy of federal standards"); 112 Cong. Rec. 14,257 (1966) (entitled "Preemption" in bill reported from committee in Senate); H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-2733 (entitled "Preemption"

in conference report); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (entitled "Preemption" in House report). Even as recodified last year, the provision is entitled "Preemption." 49 U.S.C. § 30103(b).

The preemption provision provides that, when a Federal Motor Vehicle Safety Standard is in effect, no state may establish or continue in effect "any safety standard" applicable to the same aspect of performance of motor vehicles or items of motor vehicle equipment unless the state standard is identical to the federal standard. This language encompasses state common law, to the same extent that it encompasses state statutory and regulatory law, because, as the New Hampshire court recognized, "[a] rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard and has been held to be a form of state regulation subject to the supremacy clause." App. at 4a (quoting *Cox v. Baltimore County*, 646 F. Supp. 761, 763 (D. Md. 1986). In fact, this Court has many times explicitly referred to common law rules as "state safety standards" or "state standards." *E.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "state[] safety standards" set by California products liability common law); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987) (noting the "possibility that [the defendant] will have to meet a number of different standards" if sued under different states' common law); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law). In addition, in *Cipollone* the Court reconfirmed that preemption provisions using such broad terms—in that case, "requirement or prohibition"—can preempt state common law as well as state statutory and regulatory law. *Cipollone*, —— U.S. at ——, 112 S. Ct. at 2611-12, 2617.

Nevertheless, the New Hampshire court proceeded to ignore the express preemption provision, focus solely on

section 1397(k) of the Safety Act, and, in construing section 1397(k), disregard the requirements of express preemption analysis long ago established, and recently reaffirmed, by this Court.

In *CSX Transportation, Inc. v. Easterwood,* —— U.S. ——, ——, 113 S. Ct. 1732, 1737 (1993), this Court reaffirmed the established principle that, in the interpretation of an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *Accord Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). But in holding that section 1397(k) of the Safety Act precludes any preemption of common law claims, the New Hampshire court examined neither the text nor the structure of that section, either in isolation or in conjunction with the preemption provision, section 1932(d). Instead, the court merely quoted section 1397(k), denominated it a "saving clause," and stated, " 'It is difficult to imagine broader language.' We therefore conclude that state comomn law is not explicitly preempted." App. at 5a (citation omitted).

In fact, however, section 1397(k) is not a saving clause, as that term has long been used by this Court to describe preemption-limiting provisions in federal statutes, and it is not at all difficult to imagine preemption-limiting language broader than that used in section 1397(k). Section 1397(k) merely states, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

This narrow "compliance with" predicate differs dramatically from the much broader saving-clause language that Congress used in the second two sentences of section 1392(d) of the Safety Act itself. Each of those two saving clauses begins with the clear, unambiguous, and traditional anti-preemption saving language, "Nothing in this section shall be construed . . . ." The two saving clauses state:

> Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use, if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d).

As the First Circuit correctly recognized in *Wood*, 865 F.2d at 401 n.8, 417-18, the language of section 1397(k) definitively is *not* the language commonly employed by Congress in saving clauses intended to restrict the scope of preemption. The saving clauses in virtually every other case decided by this Court in this century have used broad language similar, and often identical, to that used in the saving clauses of section 1392(d), not the narrow "compliance with" language of section 1397(k).[6]

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[6] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 525 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); *Cipollone*, —— U.S. at ——, 112 S. Ct. at 2618 (referring to saving clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person."); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (interpreting saving clauses of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-7 and 2000h-4; the first of these provides, "Noth-

The "compliance with" language addresses a different issue—namely, the extent to which compliance with gov-

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ing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . . ."; the second states, "Nor shall any provision of this Act be construed as invalidating any provision of State law"); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting saving clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "The provisions of this Act . . . shall not be held to exempt or relieve any person from any liability . . . provided by any present or future law of . . . any State . . . ."); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210 (1986) (interpreting saving clause of Death on the High Seas Act, 46 U.S.C. § 767, which states, "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter."). *See also Gade v. National Solid Wastes Management Ass'n*, —— U.S. ——, ——, 112 S. Ct. 2374, 2382, 2384 (1992) (29 U.S.C. §§ 653(b)(4) and 667(a), the saving clauses in Occupational Health and Safety Act); *California v. F.E.R.C.*, 495 U.S. 490, 497 (1990) (16 U.S.C. § 821, the saving clause in Conservation, Regulation of Power, and Water Rights Act); *Mansell v. Mansell*, 490 U.S. 581, 600 (1989) (10 U.S.C. § 1408(e)(6), the saving clause in Uniformed Services Former Spouses' Protection Act); *Ouellette*, 479 U.S. at 485, 493 (1987) (33 U.S.C. §§ 1365(a), 1370, the saving clauses in Navigation and Navigable Waters Act, Pollution Prevention Act); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 733 (1985) (29 U.S.C. § 514(a), the saving clause in National Labor Relations Act); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 7 n.11, 14-15, 29 (1981) (33 U.S.C. § 1415(g)(5), the saving clauses in Navigation and Navigable Waters Act, Ocean Dumping Act); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 443-44 (1963) (47 U.S.C. § 414, the saving clause in Wire or Radio Communication, Administration Provisions Act); *Northwest Airlines, Inc. v. County of Kent*, —— U.S. ——, 114 S. Ct. 855, 862 (1994) (49 U.S.C. § 1513(b), the saving clause in Federal Aviation Program Act); *Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (49 U.S.C. § 316, the saving clause in Motor Carriers, Rates, Fares and Charges Act, repealed Pub. L. 95-473, § 4(b), Oct. 17, 1978; Pub. L. 97-449, § 7(b), Jan. 12, 1983, 96 Stat. 2444); *Jones*, 430 U.S. at 534, 537 (15 U.S.C. § 1460, the saving clause in Fair Packing and Labeling Program Act); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981) (49 U.S.C. § 22, the saving clause in Interstate Commerce Act).

ernment statutes or regulations is a statutory or common law affirmative, complete defense. In *Honda Motor Co. v. Kimbrel*, 376 S.E.2d 379, 383 (Ga. Ct. App. 1988), for example, the court determined that compliance with Safety Standard 208 was a complete defense *under Georgia law* to a claim that a car was defective because it lacked an airbag. Section 1397(k) *permits* a state court to reach that conclusion, but it expresses Congress' intent not to *mandate* that result.

That the New Hampshire court completely misunderstood the fundamental difference between the Constitution-based doctrine of preemption and the statutory-based or common-law-based affirmative defense of compliance with statutes or regulations is made even clearer by the court's reliance on section 288C of the Restatement (Second) of Torts and page 233 of Dean Prosser's tort-law treaties. *See* App. at 7a. The former states, "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." The latter similarly provides, "While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984). Both authorities address the extent to which evidence of compliance with a statute or regulation supports an affirmative defense under common-law tort principles; neither addresses the issue of federal preemption; and both begin with the same "compliance with" language that appears in section 1397(k). Thus, contrary to the New Hampshire court's assumption, both authorities show that section 1397(k) merely makes clear that Congress did not intend for proof of a manufacturer's compliance with one or more Federal Motor Vehicle Safety Standards to be deemed an affirmative defense to common law tort claims as a matter of federal law.

The court failed to understand that preemption analysis generally does not even require a court to determine

whether a manufacturer complied with a federal standard, but instead merely requires the court to interpret the applicable federal statute and regulation, interpret the asserted state standard, and determine whether the latter conflicts with the former. In contrast, the issue of compliance does arise if a court concludes that preemption does not exist and the defendant then asserts that the factfinder should find the challenged conduct not tortious because of proof at trial that the conduct complied with applicable statutes or regulations. The text of section 1397(k) addresses this latter issue by expressing Congress' intent not to create such an affirmative defense as a matter of federal law.

B. The Supreme Court of New Hampshire Misconstrued and Misapplied the Implied Preemption Principles Established by This Court

The Supreme Court of New Hampshire also misconstrued and misapplied the implied preemption principles established by this Court. The court began by failing to recognize one of the basic categories of implied preemption that this Court has identified and applied in many cases—namely, implied conflict preemption. This is the very category of implied preemption that the United States repeatedly has stated was intended to apply to "no-airbag" claims.

1. *Failure to recognize the doctrine of implied conflict preemption*

The New Hampshire court asserted that state law is preempted by federal law in three circumstances, which it described by quoting from this Court's opinion in *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990), as follows:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law.
>
> . . .

> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation so pervasive as to make reasonable the inference that . . . Congress left no room for the States to supplement it."
>
> . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements . . . .

App. at 4a (ellipses in original). The court's last ellipsis is crucial, because the language omitted at that point from this Court's opinion in *English* states that preemption also exists "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Because it failed even to recognize the existence of that form of implied conflict preemption, the New Hampshire court also failed to consider whether "no-airbag" claims create that type of conflict with federal law. And because it failed even to consider the possibility of that type of conflict preemption, the court failed to give any deference to, or even to mention, the United States' repeated explicit statement that Safety Standard 208 was intended to preempt "no-airbag" claims precisely because the federal policy "of affirmatively encouraging diversity . . . would be disrupted by tort liability . . . ." United States Amicus Brief in *Wood* at 15. *Accord* United States Amicus Brief in *Myrick* at 28 ("The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act. See 49 Fed. Reg. 29,001 (1984)."); United States Amicus Brief in *Ritt* at 32-34 ("This core regulatory objective of promoting diversity

in restraint technologies would be wholly undermined by state law rulings inducing manufacturers to switch to an all-airbag fleet.").

2. *Failure to recognize that in* Myrick *this Court rejected the notion that* Cipollone *had effectively prohibited implied preemption analysis whenever an express preemption provision exists*

The New Hampshire court misconstrued and misapplied this Court's decision in *Cipollone*. The court indicated that it might have followed the First Circuit's decision holding "no-airbag" claims impliedly preempted in *Wood*, "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood* . . . ." App. at 6a. The only indication the court gave of how it believed *Cipollone* had changed preemption law is that, immediately after that statement, it cited a law review article which argued that "[i]n *Cipollone*, the Court specifically rejected the implied preemption analysis upon which numerous lower courts have relied in holding that state law design-defect claims were preempted under the Safety Act." Chadwell at 142 (cited in App. at 6a).

The New Hampshire court failed to acknowledge, however, that only last term this Court in *Myrick* had explicitly and unequivocally rejected as "without merit" the exact argument made by the author of that article in support of his interpretation of *Cipollone*. That author argued as follows:

> *Cipollone* signaled a significant departure from the Supreme Court's previous preemption jurisprudence. . . . Contrary to any prior precedent, seven justices apparently ruled that all doctrines of implied preemption, both "conflict" and "occupation-of-the-field" varieties, are eliminated once Congress enacts a provision that, to some degree, expressly preempts state law.

Chadwell at 173. In *Myrick*, this Court responded to that argument as follows:

> As an initial matter, we must address the argument that we need not reach the conflict pre-emption issue at all. According to respondents and the Court of Appeals, *Cipollone* . . . held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. *This argument is without merit.* In *Cipollone* we did hold that the pre-emptive scope of the two statutes at issue was governed by the language in each act. That conclusion rested on a familiar canon of statutory construction and on the absence of any reason to infer any broader pre-emption.

115 S. Ct. at 1487-88 (emphasis added).

Thus, the New Hampshire court's explicit disregard of, and open conflict with, *Wood* and all of the other federal court of appeals' decisions holding "no-airbag" claims pre-empted sprang from a misinterpretation of *Cipollone* and a failure to acknowledge that this Court had flatly rejected that misinterpretation in *Myrick*. Most of the other state courts that have refused to follow *Wood* and the other decisions holding "no-airbag" claims preempted have likewise misinterpreted *Cipollone*, often relying on the Chadwell article. *See, e.g., Heiple*, 1995 WL 602836, at *15; *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149, 152 (Mo. Ct. App. 1994).

Even if the New Hampshire court did not intend to embrace that misinterpretation of *Cipollone*, the court's cramped view of implied preemption is inconsistent with, if not in direct conflict with, *Myrick* in another respect. The court concluded that, because it had "determined that the preemption clause when read in tandem with the saving clause [section 1397(k)] 'provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legisla-

tion.' " App. at 6a. Thus, the court's view was that the anti-preemption effect of section 1397(k) was so broad as to preclude courts from even considering whether any common law standard might conflict with federal law. Accordingly, the court did not inquire whether the common law standard in issue conflicted in any way with the purposes of Safety Standard 208 and the Safety Act.

Only last term, however, this Court in *Myrick* implicitly found that nothing about the language of the Safety Act provided a reliable indicium of a congressional intent to eliminate all forms of conflict preemption, whether through the operation of section 1397(k) or otherwise. *Myrick* involved truck air-brake systems and Safety Standard 121, rather than airbags and Safety Standard 208, but the trucking company petitioners in that case, like the petitioners here, argued that the respondents' common law tort claims were both expressly and impliedly preempted. In *Myrick*, after concluding that there was no express preemption because there was no existing federal Safety Standard addressing air brakes on trucks, this Court turned to the manufacturers' contention that the common law claims in issue were impliedly preempted. Unlike the New Hampshire court here, this Court in *Myrick* did not simply terminate the implied-preemption inquiry by concluding that no consideration of possible conflicts would be appropriate because section 1397(k) foreclosed any form of implied conflict preemption.

Instead, the Court considered whether there was a conflict and concluded that there was not. Specifically, this Court held that, under the facts of that case, it was not impossible for the petitioners to comply with both federal and state law, and the respondents' lawsuits could not be said to frustrate the acocmplishment and execution of the full purposes and objectives of Congress. The Court stated, "A finding of liability against petitioners would undermine no federal objectives or purposes with

respect to ABS devices, since none exist." *Myrick*, —— U.S. at ——, 115 S. Ct. at 1488. Thus, this Court conducted exactly the type of conflict-preemption analysis that the New Hampshire court now has said is constitutionally improper under the Safety Act.

3. *Failure to recognize that federal regulations can themselves effect implied conflict preemption*

The New Hampshire court's decision is inconsistent with this Court's implied-preemption decisions in yet another respect. By focusing exclusively on the Safety Act, and in particular on section 1397(k), the court incorrectly assumed that it is only federal statutes themselves that can impliedly preempt state law. This Court has made clear, however, that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 706 (1984). In this type of case, where "state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *City of New York*, 486 U.S. at 64 (citation omitted). The New Hampshire court's failure to understand and apply this principle undoubtedly explains the court's failure to defer to, or even mention, the repeated explicit statements by the National Highway Traffic Safety Administration and the Department of Transportation of their intent to preempt "no-airbag" claims through Safety Standard 208.

4. *Failure to recognize that saving clauses do not preclude implied conflict preemption*

Even to the extent that section 1397(k) may be deemed to be an anti-preemption provision, the New Hampshire court's conclusion that the provision precludes all im-

plied conflict preemption is inconsistent with this Court's decisions establishing the inapplicability of saving clauses to that form of preemption. In a series of cases throughout this century, this Court has made clear that even saving clauses using the broader "Nothing in this act" anti-preemption language preclude only implied field preemption, not implied conflict preemption.

In *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), for example, the Court held that the Interstate Commerce Act precluded a common law action for damages, notwithstanding the Act's broad saving clause, which stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Recognizing the tension between the saving language and the broader purposes of the federal regulatory scheme, the Court held that the saving clause "cannot in reason be construed as continuing . . . a common law right" inconsistent with the underlyling federal aims. *Id.* at 446. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915). Most recently, in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 526 (1993), this Court again reaffirmed that, where such a saving clause exists, state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs."

The same holds true here. Given the explicit purpose of the National Highway Traffic Safety Administration and the Department of Transportation to promote federal motor vehicle safety policies by encouraging car manu-

facturers to provide a variety of passive restraint systems, not just airbags, it would be "extraordinary . . . to tolerate common-law suits" that would "undermine this regulatory structure." *Ouellette*, 479 U.S. at 497.

III. THE DECISION BELOW IS THE TYPE OF "NO-AIRBAG" DECISION THAT THE UNITED STATES HAS SUGGESTED SHOULD BE REVIEWED BY THIS COURT

In *Wood*, when this Court invited the United States to express its views as to whether the Court should review the First Circuit's decision holding a "no-airbag" claim preempted, the United States first observed that the First, Tenth, and Eleventh Circuits and three state appellate courts had at that time held "no-airbag" claims preempted and that no federal court of appeals or state court of last resort had held to the contrary. The Government then concluded, "[W]e believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of appeals or the state courts of last resort." United States Amicus Brief in *Wood* at 19. And, after noting that the vehicle at issue in *Wood* was manufactured in 1976, before the 1984 amendments to Safety Standard 208, the United States concluded, "Even then, the Court may prefer to resolve a case . . . involving a car as to which the 1984 version of [Safety Standard] 208 is applicable." *Id.*

This case presents just such a conflict between the federal courts of appeals and a state court of last resort, and this case involves just such a car as to which the 1984 version of Safety Standard 208 is applicable. In addition, the breadth of the conflict between those federal courts of appeals and various states' intermediate appellate courts and trial courts has greatly expanded since *Wood*. Therefore, now, even more than would have been the case had the Supreme Court of New Hampshire issued its decision in 1990, review by this Court is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 1995

APPENDICES

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Belknap
No. 93-751

JO-ANN TEBBETTS, ADMINISTRATRIX OF THE ESTATE OF REBECCA ANNE TEBBETTS

v.

FORD MOTOR COMPANY *& a.*

September 19, 1995

BATCHELDER, J. On May 15, 1991, Rebecca Anne Tebbetts was fatally injured in an automobile accident in Holderness. The plaintiff, Jo-Ann Tebbetts, administratrix of her daughter's estate, sued the defendants, Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively Ford), alleging that the 1988 Ford Escort Rebecca was driving was defectively designed because it did not contain an airbag on the driver's side. Ford moved for summary judgment on the ground that the plaintiff's "no airbag" theory violated the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988) (the Safety Act), and by Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1987) (Standard 208). The Superior Court (*O'Neil,*

J.) granted Ford's motion, ruling that the plaintiff's claim was impliedly preempted. We reverse and remand.

In response to escalating injuries and deaths from traffic accidents, Congress passed the Safety Act in 1966. *See State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 477 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The Safety Act empowered the Secretary of Transportation to "establish . . . appropriate Federal motor vehicle safety standards," 15 U.S.C. § 1392(a), defined as "minimum standard[s] for motor vehicle performance, or motor vehicle equipment performance," 15 U.S.C. § 1391(2). Consequently, the secretary promulgated Standard 208 to "reduce the number of deaths of vehicle occupants, and the severity of injuries, . . . by specifying equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208. One method for meeting Standard 208's safety requirements for the 1988 model year was motorized automatic shoulder belts and manual lap belts, the option chosen for the Ford Escort Rebecca was driving.

The supremacy clause of article VI of the United States Constitution empowers Congress to preempt state law. Nevertheless, where the States have traditionally occupied a field, we must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

> [I]t is necessary to bear in mind . . . the circumspect view courts must take of a claim that Congress has preempted states from exercising their traditional police powers on behalf of their citizens. The provision of tort remedies to compensate for personal injuries is a subject matter of the kind the Court has traditionally regarded as properly within the scope of state superintendence.

Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (quotation and brackets omitted).

Two provisions of the Safety Act are pertinent to our inquiry:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (the preemption clause). Additionally, section 1397(k) (the saving clause) provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." The issue before us is whether these provisions preempt the plaintiff's common law action.

State law is preempted by Federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . .
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the

> Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements . . . .

English v. General Electric Co., 496 U.S. 72, 78-79 (1990) (quotation and ellipsis omitted).

The United States Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), clarified preemption analysis where a statute expressly addresses that issue.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Id. at 2618 (quotations and citation omitted). Although "*Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption[,] it does not establish a rule." *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1488 (1995).

We first analyze the extent to which state law is explicitly preempted. *See English*, 496 U.S. at 78. The preemption clause prohibits a State from establishing a safety standard "which is not identical to the Federal standard." 15 U.S.C. § 1392(d). "A rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard and has been held to be a form of state regulation subject to the supremacy clause." *Cox v. Baltimore County*, 646 F. Supp. 761, 763 (D. Md. 1986). Although the language of the preemption clause alone might suggest that common law actions are preempted, we do not interpret the preemption clause in isolation. Rather we read the Safety Act as a whole, because "the meaning of statutory language, plain

or not, depends on context." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (quotation omitted). Hence we must interpret the preemption clause in tandem with the saving clause.

The saving clause provides that "[c]ompliance with *any* Federal motor vehicle safety standard . . . does not exempt any person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). "It is difficult to imagine broader language." *United States v. James*, 478 U.S. 597, 604 (1986). We therefore conclude that state common law is not explicitly preempted.

We next determine whether the Safety Act or its history "provides a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618 (quotation omitted). "In determining whether a state cause of action is preempted by federal law, our sole task is to ascertain the intent of Congress." *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 318 (Pa. Super. 1989) (quotation omitted).

Although the original Senate version of the proposed Safety Act contained no saving clause, the committee report noted that compliance with federal standards would not preempt common law claims: "[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." *S. Rep. No.* 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The bill's sponsor, Senator Warren Magnuson, commented: "Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The comon law on product liability still remains as it was." 112 *Cong. Rec.* 14230 (1966).

An examination of the House committee report is equally instructive. By inserting the saving clause, the committee "intended . . . that compliance with safety

standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." *H.R. Rep. No.* 1776, 89th Cong., 2d Sess. 24 (1966).

We therefore determine that Congress intended the Safety Act to be "supplementary of and in addition to the common law of negligence and product liability." *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968). Having determined that the preemption clause when read in tandem with the saving clause "provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone*, 112 S. Ct. at 2618 (citation and quotation omitted).

Because we must construe the preemption clause narrowly in light of the presumption against the preemption of state police power regulations, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993), and given the express utilization of the term "common law" in the saving clause, we agree with the analysis of those courts that have held that actions such as this are not preempted. *See, e.g., Gingold*, 567 A.2d at 330.

Ford argues that the majority of courts faced with a similar preemption inquiry have held common law actions preempted. *E.g., Wood v. General Motors Corp.*, 865 F.2d 395, 407-14 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Had the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*, Ford's argument would be more persuasive. *See* Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141 (1994). As the plaintiff notes, however, "[w]hile it remains to be seen whether a jury in this case will find that Ford acted unreasonably, notwithstanding its alleged compliance with [Standard] 208, the issue before this court at this time is whether the plaintiff

has the right to ask the jury to decide." We hold that on these issues she does. *See Restatement (Second) of Torts* § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); W. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue."). Accordingly, we reverse and remand.

Reversed and remanded.

All concurred.

APPENDIX B

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

BELKNAP, SS

JO-ANN TEBBETTS, Administratrix of
The Estate of Rebecca Ann Tebbetts
Young Road, Gilford, NH 03246,
Plaintiff,

v.

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Defendants.

ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

On May 15, 1991, Rebecca Ann Tebbetts (Decedent) was killed in an automobile accident while driving her 1988 Ford Escort. Plaintiff, the Administratrix of Decedent's estate, alleges that the 1988 Ford Escort, which Defendants placed in the stream of commerce, had an unreasonably dangerous and defective design in that it did not have a driver's side airbag. This design defect, according to Plaintiff, lead to Rebecca Ann Tebbetts' death. Defendants have moved for Summary Judgement as a matter of law stating that Plaintiff's claim violates the Supremacy Clause of the United States Constitution because it conflicts with the National Traffic and Motor

Vehicle Safety Act (the Safety Act) and with Federal Motor Vehicle Safety Standard 208.[1]

For a moving party to prevail at summary judgment, the Court must consider the evidence in the light most favorable to the non-moving party. *Green Mountain Insurance Co. v. Bonney*, 131 N.H. 762, 766 (1989). In addition, the pleadings, admissions, and affidavits must show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." N.H. RSA 491:8-a III; *Horse Pond Fish & Game Club v. Cormier*, 133 N.H. 648, 653 (1990). Defendants have met this standard.

Plaintiff's and Defendants' arguments revolve around two clauses in the Safety Act. Defendants claim that the Safety Act's preemption clause expressly preempts all conflicting state regulatory standards, including common law negligence claims.[2] Plaintiff, however, claims the Safety Act's savings clause protects an individual's right to sue an auto manufacturer for negligent design even if the manufacturer followed the federal regulations.[3]

---

[1] In 1966, Congress enacted the Safety Act. The Safety Act required the Secretary of Transportation to promulgate the Federal Motor Vehicle Safety Standards. When the Tebbetts Escort was built, Standard 208 required all cars have either airbags or automatic safety belts. The Tebbetts' Escort had authorized safety belts.

[2] The preemption clause states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish . . . . any safety standard applicable to the same aspect of performance of such vehicle or item of equipment, which is not identical to the federal standard. 15 U.S.C. § 1392(d).

[3] The savings clause states:

> Compliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from any liability under common law. 15 U.S.C. sec. 1397(c).

While courts have almost unanimously concluded that the Safety Act does not expressly preempt common law claims against automobile manufacturers, those same courts have found that such claims are impliedly preempted.[4] *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1120-25 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824, 827 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395, 402, 411 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Common law liability claims must be preempted, otherwise the courts will be "establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress." *Wood v. General Motors Corp., supra* at 402. Where common law claims "directly undermine" and "frustrate the federal regulatory scheme," they must be preempted. *Pokorny v. Ford Motor Co., supra* at 1124; *Taylor v. General Motors Corp., supra* at 827. This reasoning has recently been reanalyzed and upheld. *Gills v. Ford Motor Co.*, No. C91-0256-P(H) (W.D. Ky. Sept. 1, 1993).

Plaintiff asserts that the savings clause supersedes the preemption clause and provides an avenue for Plaintiff's suit. Congress writes savings clauses, however, to indicate where legislation does not entirely withdraw a topic from a state jurisdiction. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). In the face of a savings clause, states may still regulate, but only in ways consistent with the purposes of the federal statute. *Pennsylvania Railroad v. Puritan Coal Mining*

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[4] The preemption clause forbids states from establishing "safety standards" that conflict with the Safety Act. It has long been held that damage awards under common law can constitute state regulations. *San Diego Bldg. Trades Council v. Garmon*, 79 S. Ct. 773, 780 (1959).

Co., 237 U.S. 121, 129-30 (1915). Thus, in this case, the savings clause cannot be invoked by Plaintiff to protect their suit. As the Supreme Court noted:

> It would be extraordinary for Congress, after devising an elaborate . . . system that sets clear standards, to tolerate common-law suits that have the potential to undermine regulatory structure.

International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

Public statements emanating from both Congress and the Department of Transportation which relate to preemption support Defendants position. Both branches of the government were concerned with national uniformity in automobile regulations and wanted to offer manufacturers flexibility in designing safety features. 52 Fed. Reg. 42440, 42441-44 (Nov. 5, 1987); 49 Fed. Reg. 28962, 29000-01 (July 17, 1984); S. Rep. No. 1301, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. If common law claims are tried in courts across the country, the goals and purposes of the Safety Act will be compromised.

Because the issues raised in this case have been extensively discussed by the above cited courts and because this Court finds itself in agreement with those decisions, this court will not rehash that discussion any further. In conclusion, the Court echos Judge Heyburn's exiting ruminations:

> If the federal regulations requiring a choice of safety features do not impliedly or expressly shield a manufacturer from liability for making the very choice mandated, then the Safety Act has little purpose or any reason for being. The Court will not presume that Congress intended such an unfair result from its regulation. *Gills v. Ford Motor Co., supra.*

Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

So ORDERED.

Date: 10-14-93

/s/ William J. O'Neil
WILLIAM J. O'NEIL
Presiding Justice

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

MOTOR VEHICLE SAFETY

49 U.S.C. § 30103. Relationship to other laws

(a) Uniformity of regulations.—The Secretary of Transportation may not prescribe a safety regulation related to a motor vehicle subject to subchapter II of chapter 105 of this title that differs from a motor vehicle safety standard prescribed under this chapter. However, the Secretary may prescribe, for a motor vehicle operated by a carrier subject to subchapter II of chapter 105, a safety regulation that imposes a higher standard of performance after manufacture than that required by an applicable standard in effect at the time of manufacture.

(b) Preemption.—**(1)** When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

(c) Antitrust laws.—This chapter does not—

(1) exempt from the antitrust laws conduct that is unlawful under those laws; or

(2) prohibit under the antitrust laws conduct that is lawful under those laws.

(d) Warranty obligations and additional legal rights and remedies.—Sections 30117(b), 30118-30121, 30166(f), and 30167(a) and (b) of this title do not establish or affect a warranty obligation under a law of the United States or a State. A remedy under those sections and sections 30161 and 30162 of this title is in addition to other rights and remedies under other laws of the United States or a State.

(e) Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 943.)

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 *Second option—lap belt protection system with belt warning.* The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any

Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 or S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passengers cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 *Calculation of complying passenger cars.*

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not in-

cluding any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

* * * *

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

S4.1.4.2 (a) Each passenger car, other than a convertible, manufactured before December 11, 1989 may be equipped with, and each passenger car, other than a convertible, manufactured on or after December 11, 1989 and before September 1, 1990 shall be equipped with a Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed pursuant to this provision shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1.1 of this standard.

(b) Except as provided in S4.1.4.2.1 and S4.1.4.2.2, each passenger car, other than a convertible, manufactured on or after September 1, 1990 and each convertible

passenger car manufactured on or after September 1, 1991 shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. If a Type 2 seat belt assembly installed in compliance with this requirement incorporates any webbing tension-relieving device, the vehicle owner's manual shall include the information specified in S7.4.2(b) of this standard for the tension relieving device, and the vehicle shall comply with S7.4.2(c) of this standard.

(c) As used in this section, "rear outboard designated seating position" means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions.

* * * *

S4.1.5 *Passenger cars manufactured on or after September 1, 1996.*

S4.1.5.1 *Frontal/angular automatic protection system.*

(a) Each passenger car manufactured on or after September 1, 1996 shall:

(1) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(2) At any front designated seating positions that are not "outboard designated seating positions," as that term is defined at 49 CFR 571.3, and at any rear designated seating positions that are not "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c)

of this standard, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 and S7.2 of this standard; and

(3) At each front designated seating position that is an "outboard designated seating position," as that term is defined at 49 CFR 571.3, and at each rear designated seating position that is a "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3 of this standard, and, in the case of the Type 2 seat belt assemblies installed at the front outboard designated seating positions, meet the frontal crash protection requirements with the appropriate anthropomorphic test dummy restrained by the Type 2 seat belt assembly in addition to the means that requires no action by the vehicle occupant.

(b) For the purposes of this section, an *inflatable restraint system* means an air bag that is activated in a crash.

S4.1.5.2 *Passenger cars manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.1.5.2.1 The amount of passenger cars complying with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position shall be not less than 95 percent of the manufacturer's total production of passenger cars manufactured on or after September 1, 1996, and before September 1, 1997. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * * *

S4.1.5.3 *Passenger cars manufactured on or after September 1, 1997.* Each passenger car manufactured on or after September 1, 1997 shall comply with the re-

quirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly. An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint system pursuant to S4.1.5.2, S4.1.5.3, S4.2.6.1, or S4.2.6.2 of this standard.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 An automatic belt furnished pursuant to S4.5.3 shall:

(a) Conform to S7.1 and have a single emergency release mechanism whose components are readily accessible to a seated occupant.

(b) In place of a warning system that conforms to S7.3 of this standard, be equipped with the following

warning system: At the left front designated seating position (driver's position), a warning system that activates a continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds and that activates a continuous or flashing warning light visible to the driver for not less than 60 seconds (beginning when the vehicle ignition switch is moved to the "on" or the "start" position) when condition (A) exists simultaneously with condition (B), and that activates a continuous or flashing warning light, visible to the driver, displaying the identifying symbol for the seat belt telltale shown in Table 2 of Standard No. 101 (49 CFR 571.101), or, at the option of the manufacturer if permitted by Standard No. 101, displaying the words "Fasten Seat Belts" or "Fasten Belts," for as long as condition (A) exists simultaneously with condition (C).

(A) The vehicle's ignition switch is moved to the "on" position or to the "start" position.

(B) The driver's automatic belt is not in use, as determined by the belt latch mechanism not being fastened, or, if the automatic belt is non-detachable, by the emergency release mechanism being in the released position. In the case of motorized automatic belts, the determination of use shall be made once the belt webbing is in its locked protective mode at the anchorage point.

(C) The belt webbing of a motorized automatic belt system is not in its locked, protective mode at the anchorage point.

S4.5.3.4 An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5, by means that require no action by vehicle occupants.

S4.1.1.2 *Second option—lap belt protection system with belt warning.* The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1 in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each pasenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper

torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2. *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that con-

forms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with

the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 *Calculation of complying passenger cars.*

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

* * * *

S4.1.4 *Passenger cars manufactured on or after September 1, 1989.* Except as provided in S4.1.5, each passenger car manufactured on or after September 1, 1989, shall comply with the requirements of S4.1.2.1. Until September 1, 1993, each car whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt that meets the requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.5 *Mandatory seatbelt use laws.*

S4.1.5.1 If the Secretary of Transportation determines, by not later than April 1, 1989, that state mandatory safety belt usage laws have been enacted that meet the criteria specified in S4.1.5.2 and that are applicable to not less than two-thirds of the total population of the 50 states and the District of Columbia (based on the most recent Estimates of the Resident Population of States, by Age, Current Population Reports, Series P-25. Bureau of the Census), each passenger car manufactured under S4.1.3 or S4.1.4 on or after the date of that determination shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3.

S4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the belt usage reqiurement.

(2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

* * * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 An automatic belt furnished pursuant to S4.5.3 shall:

(a) Conform to S7.1 and have a single emergency release mechanism whose components are readily accessible to a seated occupant.

(b) In place of a warning system that conforms to S7.3 of this standard, be equipped with the following warning system: At the left front designated seating position (driver's position), a warning system that activates a continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds and that activates a continuous or flashing warning light visible to the driver for not less than 60 seconds (beginning when the vehicle ignition switch is moved to the "on" or the "start" position) when condition (A) exists simultaneously with conditions (B), and that activates a continuous or flashing warning light, visible to the driver, displaying the identifying symobl for the seat belt telltale shown in Table 2 of Standard No. 101 (49 CFR 571.101), or, at the option of the manufacturer if permitted by Standard No. 101, displaying the words "Fasten Seat Belts" or "Fasten Belts," for as long as condition (A) exists simultaneously with condition (C).

(A) The vehicle's ignition switch is moved to the "on" position or to the "start" position.

(B) The driver's automatic belt is not in use, as determined by the belt latch mechanism not being fastened, or, if the automatic belt is non-detachable, by the emergency release mechanism being in the released position. In the case of motorized automatic belts, the determination of use shall be made once the belt webbing is in its locked protective mode at the anchorage point.

(C) The belt webbing of a motorized automatic belt system is not in its locked, protective mode at the anchorage point.

S4.5.3.4 An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

APPENDIX D

Decisions Finding Preemption Under Safety Standard 208

Federal

1. *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. Mar. 28, 1986)
2. *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. Sept. 26, 1986) (Ford)
3. *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio Oct. 31, 1986)
4. *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. Jan. 5, 1987)
5. *Staggs v. Chrysler Corp.*, 687 F. Supp. 270 (N.D. Ga. Jan. 25, 1987)
6. *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. Feb. 19, 1987)
7. *Wattelet v. Toyota Motor Co.*, 676 F. Supp. 1039 (D. Mont. Apr. 27, 1987)
8. *Donnelly v. General Motors Corp.*, No. 86-576-JU (D. Or. Aug. 3, 1987)
9. *Distler v. General Motors Corp.*, No. 4-86-821 (D. Minn. Sept. 3, 1987)
10. *Bass v. General Motors Corp.*, No. SA-86-CA-279 (W.D. Tex. Sept. 14, 1987)
11. *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. Dec. 15, 1987)
12. *Ritt v. General Motors Corp.*, No. 86-C-1737 (N.D. Ill. Jan. 20, 1988)
13. *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. Feb. 13, 1988)
14. *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. Feb. 18, 1988)

15. *Heftel v. General Motors Corp.*, No. 85-1713 (D.D.C. Feb. 23, 1988)

16. *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. May 10, 1988)

17. *Howard v. American Motors Corp.*, No. 85-1754 (S.D. Tex. July 26, 1988)

18. *Rodriguez v. General Motors Corp.*, No. CV 88-3361 SWV(GX) (C.D. Cal. Oct. 4, 1988)

19. *Hunter v. General Motors Corp.*, No. H-86-546 (TEC) (D. Conn. Nov. 23, 1988)

20. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. Dec. 28, 1988), *cert. denied*, 494 U.S. 1065 (1990)

21. *Falk v. Chrysler Corp.*, No. R87-1057 (D. Md. Feb. 23, 1989)

22. *Hunt v. Ford Motor Co.*, No. CV-88-AR-1756-M (N.D. Ala. Mar. 30, 1989)

23. *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. May 19, 1989), *cert. denied*, 494 U.S. 1065 (1990)

24. *Richart v. Ford Motor Co.*, 875 F.2d 787 (10th Cir. May 19, 1989), *cert. denied*, 494 U.S. 1065 (1990)

25. *Taylor v. Ford Motor Co.*, 875 F.2d 816 (11th Cir. June 14, 1989), *cert. denied*, 494 U.S. 1065 (1990)

26. *Dallas v. General Motors Corp.*, 725 F. Supp. 908 (W.D. Tex. Sept. 22, 1989)

27. *Nadeau v. Ford Motor Co.*, No. 89-30315 (N.D. Fla. Jan. 3, 1990)

28. *Purdy v. Ford Motor Co.*, No. 89-30314 (N.D. Fla. Jan. 3, 1990)

29. *Weinstein v. Ford Motor Co.*, No. 4:89-2590.15 (D.S.C. Feb. 9, 1990)

30. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. Apr. 30, 1990), *cert. denied*, 498 U.S. 853 (1990)

31. *Guerra v. General Motors Corp.*, No. C86-2102A1 JTC (N.D. Ga. May 14, 1990)

32. *Knox v. Chrysler Corp.*, No. H-88-3657 (S.D. Tex. June 28, 1990)

33. *Favre v. Ford Motor Co.*, No. TY-89-609-CA (E.D. Tex. July 6, 1990)

34. *Adams v. Chrysler Motors Corp.*, No. H-89-73 (S.D. Tex. July 13, 1990)

35. *Moga v. Ford Motor Co.*, No. EP-90-CA-87-B (W.D. Tex. Dec. 1, 1990)

36. *Chu Shin Pak v. Chrysler Motor Corp.*, No. 90-3447 (E.D. Pa. Dec. 4, 1990), *aff'd*, No. 91-1112 (3rd Cir. July 3, 1991)

37. *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. Jan. 8, 1991)

38. *Lappe v. Honda Motor Co.*, No. 91-393 (HLS) (D.N.J. July 11, 1991)

39. *Cerniak v. Nissan Motor Co.*, No. 88-C-4815 (N.D. Ill. July 26, 1991)

40. *Laleman v. Nissan Motor Co.*, No. 89-4036 (C.D. Ill. Aug. 19, 1991)

41. *O'Bryan v. Volkswagen of Am. Inc.*, 838 F. Supp. 319 (W.D. Ky. Aug. 4, 1992)

42. *Wright v. Ford Motor Co.*, No. IP92-1131-C (S.D. Ind. July 16, 1993)

43. *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. Sept. 1, 1993)

44. *Montag v. Honda Motor Co.*, 856 F. Supp. 574 (D. Colo. June 9, 1994), *appeal filed*

45. *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. June 24, 1994)

46. *Furness v. General Motors Corp.*, No. 93-Z-36 (D. Colo. Dec. 9, 1994)

47. *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. Mar. 20, 1995)

48. *Easley v. Ford Motor Co.*, No. 6:95-CV-00026 (E.D. Okla. May 31, 1995) (based on plaintiff's failure to oppose)

49. *Basey v. General Motors Corp.*, No. 2:93-CV-01413 (D. Ariz. June 5, 1995)

50. *Dutton v. General Motors Corp.*, No. DIV-94-793A (W.D. Okla. July 24, 1995)

51. *Teitloff v. Vulcon Materials Co.*, No. 93-079-P(R) (W.D. Ky. Aug. 3, 1995) (Ford)

State

1. *Phillips v. Namie*, No. 85-33951-CA07 (Fla. Cir. Ct. Sept. 22, 1986) (General Motors)

2. *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. Oct. 18, 1986)

3. *Mackey v. American Honda Motor Co.*, No. 83 CV-08-4508 (Ohio Ct. C.P. Dec. 29, 1986)

4. *Ross v. Ford Motor Co.*, No. CV-119361 (Ohio Ct. C.P. May 5, 1987)

5. *Puzio v. General Motors Corp.*, No. L-072325-85 (N.J. Super. Ct. Mar. 27, 1987)

6. *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. Sept. 24, 1987)

7. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. Dec. 22, 1987), *cert. denied*, 487 U.S. 1236 (1988)
8. *Wolfe v. General Motors Corp.*, No. CV 87-20704 (Ohio Ct. C.P. 1988)
9. *Sutton v. Allenberg*, No. 6551 (Idaho Dist. Ct. Feb. 25, 1988) (General Motors)
10. *Aronowitz v. General Motors Corp.*, No. 23118/84 (N.Y. Sup. Ct. Mar. 18, 1988)
11. *Garman v. Mazda Motor Corp.*, No. 85-13839-T (Tex. Dist. Ct. Apr. 6, 1988)
12. *Groves v. Chrysler Corp.*, No. 84-7-302 (Or. Cir. Ct. Apr. 27, 1988)
13. *McLaughlin v. General Motors Corp.*, No. LK-27-2 (Va. Cir. Ct. May 16, 1988)
14. *Parker v. Chrysler Corp.*, No. OCV-36391 (Cal. Super. Ct. June 10, 1988)
15. *Davis v. American Honda Motor Co., Inc.*, No. 86-125-199 (Tex. Dist. Ct. July 19, 1988)
16. *Martinez v. Ford Motor Co.*, No. 87-893CW (Fla. Cir. Ct. Aug. 5, 1988)
17. *Hill v. Oakland County Road Com'n*, No. 88-344327 NP (Mich. Cir. Ct. Sept. 7, 1988) (Ford)
18. *Seymour v. General Motors Corp.*, CA No. 86-2815 (R.I. Super. Ct. Sept. 26, 1988)
19. *McRoberts v. Mazda Motor Corp.*, No. 86-1630-M (Tex. Dist. Ct. Oct. 13, 1988)
20. *Perkins v. General Motors Corp.*, No. EAC 57623 (Cal. Super. Ct. Oct. 19, 1988)
21. *Mazey v. General Motors Corp.*, No. A 243881 (Nev. Dist. Ct. Dec. 6, 1988)

22. *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (App. Div. Dec. 23, 1988)

23. *Matthews v. Chrysler Corp.*, No. 87-P-675 (Ohio Ct. C.P. Jan. 6, 1989)

24. *Gourley v. Ford Motor Co.*, No. 87-L-17034 (Ill. Cir. Ct. May 31, 1989)

25. *Kane v. Mitsubishi Motor Sales of Am.*, No. 9649/88 (N.Y. Sup. Ct. June 9, 1989)

26. *Nissan Motor Corp. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (June 22, 1989), *cert. denied*, 494 U.S. 1066 (1990)

27. *Noone v. Oldsmobile Div. of General Motors Corp.*, No. 85-68704 (Tex. Dist. Ct. Jan. 24, 1989)

28. *Mudrick v. Nissan Motor Corp.*, No. C-539-035 (Cal. Super. Ct. July 31, 1989)

29. *Taylor v. Nissan Motor Corp.*, No. EAC-54484 (Cal. Super. Ct. Aug. 22, 1989)

30. *Dever v. Langthorp*, No. 85-53451 (Tex. Dist. Ct. Aug. 24, 1989) (General Motors)

31. *Seemann v. General Motors Corp.*, No. 86-6145 (CL) I (Fla. Cir. Ct. Aug. 31, 1989)

32. *Sturges v. Sokorai*, No. L-072741-86 (N.J. Sup. Ct. Nov. 28, 1989) (Ford)

33. *Cox v. Chrysler Corp.*, No. 89-CP-23-4652R (S.C. Ct. C.P. Dec. 27, 1989)

34. *Gonet v. General Motors Corp.*, No. 882-00731 (Mo. Cir. Ct. Feb. 5, 1990)

35. *Handley v. General Motors Corp.*, No. CV 87-57 (Ala. Cir. Ct. Feb. 8, 1990)

36. *Rosqueta v. American Honda Motor Co.*, No. 1178 (Pa. Ct. C.P. Feb. 19, 1990)

37. *Makue v. Nissan Motor Co.*, No. 86-3311 (Haw. Cir. Ct. Feb. 23, 1990)

38. *Steinborn v. Southeastern Fidelity Ins. Co.*, No. 60-009(B) (La. Dist. Ct. Feb. 28, 1990) (General Motors)

39 *Abbott v. Ford Motor Co.*, No. L 10846-87 (N.J. Super. Ct. Mar. 14, 1990)

40. *Lind v. Ford Motor Co.*, No. W-002258-88 (N.J. Super. Ct. Mar. 19, 1990)

41. *Gallegos v. Ford Motor Co.*, No. 88-58105 (Tex. Dist. Ct. Mar. 27, 1990)

42. *Allison v. General Motors Corp.*, No. CV 87-3960 (Ala. Cir. Ct. Apr. 19, 1990)

43. *Brown v. Northrop Corp.*, No. 030630 (Cal. Super. Ct. Apr. 12, 1990) (Honda)

44. *Kieta v. Davis*, No. 88-L-18940 (Ill. Cir. Ct. July 6, 1990) (Ford)

45. *Ryan v. General Motors Corp.*, No. CJ-89-1641 (Okla. Dist. Ct. July 12, 1990)

46. *Griffin v. Ford Motor Co.*, No. 89-09-04716 CV (Tex. Dist. Ct. Oct. 15, 1990)

47. *Schaefer v. Chrysler Motor Corp.*, No. 88-L-47 (Ill. Dist. Ct. Oct. 26, 1990)

48. *Buchanan v. General Motors Corp.*, No. CV 89-56 J (Ala. Cir. Ct. Nov. 15, 1990)

49. *Arelliano v. Canon*, No. 88-115 (Haw. Cir. Ct. Dec. 2, 1990) (Honda)

50. *Dunshie v. General Motors Corp.*, No. A-136,024 (Tex. Dist. Ct. Dec. 6, 1990)

51. *Laskowsky v. Ford Motor Co.*, No. 90-5832-NP (Mich. Cir. Ct. Dec. 18, 1990)

52. *Coleman v. Moga,* No. 90-2979 (Tex. Dist. Ct. Dec. 21, 1990) (Ford)

53. *Goodall v. Ford Motor Co.,* (Mich. Cir. Ct. 1991)

54. *Johnson v. Ford Motor Co.,* No. 91-523 (Va. Cir. Ct. 1991)

55. *Jeschke v. Canton Motors, Inc.,* No. 88-520 (Tex. Dist. Ct. Jan. 7, 1991) (General Motors)

56. *Ramos v. Saldana,* No. C-2922-87-F (Tex. Dist. Ct. Mar. 5, 1991) (Toyota)

57. *Brackens v. General Motors Corp.,* No. D-47026 (Ga. Super. Ct. Mar. 7, 1991)

58. *Berlanga v. General Motors Corp.,* No. 160926 (Cal. Super. Ct. Apr. 18, 1991)

59. *Hilbun v. General Motors Corp.,* No. 65494/37 (Mont. Dist. Ct. May 6, 1991)

60. *Pett v. Ford Motor Co.,* No. 90-L-8786 (Ill. Cir. Ct. July 8, 1991)

61. *Skidmore v. Chrysler Motors Corp.,* No. 33,521-361 (Tex. Dist. Ct. Aug. 5, 1991)

62. *Smith v. American Family Mut. Ins. Co.,* No. 91CV0077 (Wis. Cir. Ct. Jan. 7, 1992) (Honda)

63. *McInroe v. Ford Motor Co.,* No. 91-0004-E (Tex. Dist. Ct. Apr. 23, 1992)

64. *Farnsworth v. General Motors Corp.,* No. 3AN-91-946 Civil (Alaska Super. Ct. July 14, 1992)

65. *Cooper v. General Motors Corp.,* No. 3773 (Miss. Cir. Ct. Sept. 18, 1992), *appeal filed*

66. *Maxedon v. Volkswagen of Am., Inc.,* No. 90-CI-028 (Ky. Cir. Ct. Jan. 7, 1993)

67. *Marrs v. Ford Motor Co.,* 852 S.W.2d 570 (Tex. App.—Dallas Jan. 27, 1993, no writ)

68. *Ketchum v. Hyundai Motor Am.*, No. VC 004170 (Cal. Super. Ct. Feb. 26, 1993), *appeal filed*

69. *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. May 18, 1993)

70. *Shelley v. Ford Motor Co.*, No. 88-37789 (Tex. Dist. Ct. Apr. 8, 1989), *motion for reconsideration denied* (May 18, 1993)

71. *Ahasteen v. Hyundai Motor Am.*, No. CV-91-1966 (N.M. Dist. Ct. June 24, 1993)

72. *Jenkins v. Mitsubishi Motor Co.*, No. RCV 56635 (Cal. Super. Ct. Aug. 31, 1993)

73. *Lara v. Bustos, Hyundai Motor Am.*, No. VC 00789 (Cal. Super. Ct. Oct. 5, 1993)

74. *Zimmerman v. Volkswagen of Am., Inc.*, No. 94139 (Idaho Dist. Ct. Oct. 20, 1993), *appeal filed*

75. *Bryant v. Elliott*, No. 91-2-17057-6 (Wash. Sup. Ct. Dec. 3, 1993) (Chrysler)

76. *Winters v. Ford Motor Co.*, No. 9204176 (Tex. Dist. Ct. Dec. 20, 1993)

77. *Muntz v. Pennsylvania*, No. 90-02356 (Pa. Ct. C.P. Apr. 15, 1994) (Volvo)

78. *Nelson v. Ford Motor Co.*, No. 93 CV 000471 (Ohio Ct. C.P. June 21, 1994), *appeal filed*

79. *Miranda v. Fridman*, 647 A.2d 167 (N.J. App. Div. July 21, 1994) (Hyundai)

80. *Dykema v. Volkswagenwerg AG*, 525 N.W.2d 754 (Wis. Ct. App. No. 8, 1994), *cert. denied*, No. 94-1910, 1995 WL 334794 (U.S. Oct. 2, 1995)

81. *Wilson v. Pleasant*, 645 N.E.2d 638 (Ind. Ct. App. Dec. 29, 1994), *cert. granted and decision vacated while case is pending before Ind. Supreme Ct.*

82. *Panarites v. Williams*, 629 N.Y.S.2d 359 (App. Div. June 9, 1995) (Toyota)

83. *McCoppin v. Mazda Motor Co.*, No. 27 17 11 (Cal. Super. Ct. Sept. 27, 1995)

APPENDIX E

Decisions Finding No Preemption Under Safety Standard 208

Federal

1. *Murphy v. Nissan Motor Corp. U.S.A.*, 650 F. Supp. 922 (E.D.N.Y. Jan. 7, 1987)
2. *Fischer v. Chrysler Motors Corp.*, No. 85-699-T (D. Mass. Feb. 9, 1987)
3. *Thomas v. Ford Motor Co.*, No. 8:91-2631-3 (D.S.C. Mar. 16, 1992)
4. *Harris v. Ford Motor Co.*, No. CV 93-5248 DT (JGX) (D.C. Cal. Aug. 22, 1994), *appeal filed*
5. *Reichert v. Ford Motor Co.*, No. 91-292-JPG (S.D. Ill. Jan. 22, 1993)

State

1. *Lynch v. Mims*, No. GC-G-85-0019 (Fla. Cir. Ct. Aug. 20, 1985) (Ford)
2. *Barfels v. Holman Imports, Inc.*, No. 85-1901 CS (Fla. Cir. Ct. Sept. 25, 1985) (Mitsubishi)
3. *Morgan v. Noble*, No. 84-CI-136 (Ky. Cir. Ct. Feb. 17, 1986) (Ford)
4. *Bateman v. Demsher*, No. GD 84-4994 (Pa. Ct. C.P. June 18, 1986) (Ford)
5. *Munson v. Ford Motor Co.*, No. B-840, 570 (Tex. Dist. Ct. May 15, 1986)
6. *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986), *jury verdict for defendant, judgment for defendant aff'd on other grounds*, 814 S.W.2d 755 (Tex. App. — Dallas 1991, writ denied), *cert. denied*, No. 91-2070 (Oct. 5, 1992) (daily transcript issue)

7. *Burge v. American Honda Motor Co.*, No. 41-74-75 (Cal. Super. Ct. June 30, 1987)
8. *Russell v. Johnson*, No. 83-3931-CA (Fla. Cir. Ct. July 17, 1987) (Ford)
9. *Salinas v. Toyota Motor Corp.*, No. 85-6068-B (Tex. Dist. Ct. Oct. 13, 1987)
10. *Lastooka v. General Motors Corp.*, No. GD 85-14613 (Pa. Ct. C.P. Dec. 28, 1987)
11. *Rasco v. Nissan Motor Corp.*, No. 86-C2148 (Tex. Dist. Ct. Jan. 26, 1989)
12. *Gingold v. Audi-NSU-Auto Union AG*, 567 A.2d 312 (Pa. Super. Ct. Dec. 6, 1989)
13. *Nogaraj v. Pennsylvania Dept. of Transp.*, No. 85-05664-15-1 (Pa. Ct. C.P. Oct. 1, 1990), *petition for review granted*, No. 214 Misc. Dkt. 14 (Pa. Super. Ct. July 31, 1991), *appeal dismissed* (Honda)
14. *Nightingale v. Kennedy Memorial Hosp.*, No. L-00276-89 (N.J. Super. Ct. Nov. 9, 1990) (Ford)
15. *Eads v. Mazda Motor Corp.*, No. 902-01987 (Mo. Cir. Ct. Apr. 8, 1991)
16. *Thomson v. General Motors Corp.*, No. 3396 (Pa. Ct. C.P. Mar. 15, 1991)
17. *Coles v. Honda Motor Co.*, No. 90-CI-106 (Ky. Cir. Ct. May 6, 1991)
18. *Cothern v. Ford Motor Co.*, No. 90-CI-240 (Ky. Cir. Ct. May 6, 1991)
19. *Perez v. Ford Motor Co.*, No. 8709 (Tex. Dist. Ct. Sept. 6, 1991)
20. *Steen v. Chrysler Motors Corp.*, No. C4-01-601951 (Minn. Dist. Ct. Aug. 4, 1992), *review denied* Minn. Nov. 17, 1992)
21. *Martinez v. Ford Motor Co.*, No. 91-21046-NI (Mich. Cir. Ct. Oct. 12, 1993), *appeal filed*

22. *Beckman v. Chrysler Corp.*, No. CIV-93-489(III) (Ark. Cir. Ct. Dec. 17, 1993)

23. *Cellucci v. General Motors Corp.*, No. 2803 (Pa. Ct. C.P. Aug. 19, 1993), *appeal filed; hearing en banc ordered*

24. *Sumner v. Chrysler Corp.*, No. 94 414108 NI (Mich. Cir. Ct. 1994)

25. *Gosal v. Almaden Hyndai*, No. 719909 (Cal. Sup. Ct. June 21, 1994)

26. *Bennett v. Brown*, No. 92-72-120 (Miss. Cir. Ct. June 28, 1994) (General Motors)

27. *Cleghorn v. Ford Motor Co.*, 93-3146-3 (Tex. Dist. Ct. June 30, 1994)

28. *Loulos v. Ford Motor Co.*, 882 S.W.2d 149 (Mo. Ct. App. May 31, 1994)

29. *Hyundai Motor Co. v. Phillip*, 639 So. 2d 1064 (Fla. App. 3 Dist. July 12, 1994)

30. *Davis v. Teller*, No. 4569-C (Pa. Ct. C.P. Aug. 12, 1994) (General Motors)

31. *Bradecich v. Ford Motor Co.*, No. 93 L 03928 (Ill. Cir. Ct. Aug. 26, 1994)

32. *Mericsko v. General Motors Corp.*, No. CV-161892 (Ohio Ct. C.P. June 23, 1994)

33. *Hernandez-Gomez v. Leonarde*, 884 P.2d 183 (Ariz. Nov. 1, 1994), *vacated and remanded sub nom. Volkswagen of Am., Inc. v. Hernandez-Gomez*, —— U.S. ——, 115 S. Ct. 1819 (1995)

34. *Blakely v. Ford Motor Co.*, No. 4031 (Pa. Ct. C.P. Feb. 1, 1995)

35. *Alvarado v. Hyundai Motor Co.*, —— S.W.2d ——, 1995 WL 468366 (Tex. Ct. App.—Austin Aug 9, 1995)

36. *Heiple v. C.R. Motors, Inc. (GM)*, —— A.2d ——, 1995 WL 488116 (Pa. Super. Ct. Aug. 14, 1995)

37. *Tebbetts v. Ford Motor Co.*, No. 93-751 (N.H. Sept. 19, 1995)